ON THE COMPETENCE OF COLONIAL LEGISLATURES TO ENACT LAWS IN DEROGATION OF COMMON LIABILITY OR COMMON RIGHT.—By Thomas Chisholm Anstey, Esq., Barrister-at-Law.

[*Read*, 23*rd December*, 1868.]

The "transmarine dominions" of this Crown include, or may include, foreign protectorates, possessions used merely as military or naval stations, and the jurisdictions, without possession, to which the Turkish capitulations and the Chinese treaties with Great Britain are her titles. The interests of those three classes of dominions are important, but they do not belong to the subject of the present paper. It is limited to the "colonies" of this Empire;—a word which, now that India is under the direct rule of the Queen, I must consider, etymologically inaccurate as it may be, quite comprehensive enough to include all the "transmarine dominions" of the Queen, except those of the three classes above specified.

All British colonies, whether by plantation, cession, or conquest, now possess, in more or less fulness, the delegated right of legislation over themselves and their dependencies; for they all claim to have dependencies; and even the little islet of Hong-Kong, in her Legislative Acts and other State papers, prophetically asserts the same pretention. When the invaluable work of our learned colleague, Mr. Clark, upon Colonial Law, made its appearance,* and for long afterwards, that was still the distinctive character, as he very clearly

* "Summary of Colonial Law," etc., by Charles Clark, Esq. (1834.) pp. 4-8.

shewed, of one great division of the colonies. But that is so no longer. All the colonies now possess that authority, in a greater or lesser degree, whether they came to us by plantation, or by cession, or by conquest. Therefore, as to these, whatever may become the case of future conquests or cessions of territory*, that exceptional power of the Sovereign to make laws at his own pleasure, which was once the theme of so much controversy, has at all events now ceased to exist. It is difficult to conceive, how such a power can lawfully coexist with that immediate and entire naturalisation by act of law, whereby, from the moment when the cession or conquest is consummated, there is conferred upon every inhabitant—whatever his origin, colour, or creed—all the liberties and rights, and even the legal designations, of "an Englishman" and "a natural born British subject."† But the question, for the present at least, is without any practical value. If the arbitrary power to legislate for British subjects of that kind ever belonged to the Crown,‡ it can now no longer be exercised against any now within its allegiance. For, when it created their present "Assemblies" or "Councils"—whether of their representatives, or of its own nominees—and gave them to know that to those bodies was delegated the power of

* As to which, however, see Mr. Baron Maseres' argument, in notes to Campbell *v.* Hall, 20 How. St. Tr., 333-354; also see Mayor of Lyons *v.* E. I. Company, 1 Moo. I. Ap. C. 280, 282, 284-6.

† See, in Chalmers' "Opinions" (Edition of 1858) upon this point, the following:—(as to "all the Plantations") of Trevor, A.G., afterwards Lord Trevor, C.J., June 4, 1701, p. 644—(as to "Virginia") of West, afterwards Lord Chancellor of Ireland, January 16, 1723, pp. 439, 440—(as to "Guadaloupe") of Pratt, A.G., afterwards Earl of Camden, C., August 7, 1759, pp. 640, 641; and of Yorke, S.G., afterwards Lord Chancellor, August 13, 1759, pp. 642, 643;—and (as to "Canada, Florida, and the ceded islands in the West Indies") of Norton, A.G., July 27, 1764, pp. 647, 648.

‡ See Mr. Baron Maseres' argument *ubi supra*, and "Canadian Freeholder;"—Dialogue II., p. 297.

legislation for the future, the Crown must necessarily, according to Lord Mansfield*—no cold or doubtful friend of Royal Prerogative—be deemed to have precluded itself from any exercise of its legislative authority over those colonies by virtue of its prerogative.

Over all these subordinate legislatures the Imperial Parliament is supreme. It possesses *ipso jure* and in all its plenitude that legislative power, of which some of them possess more and others less, but none of them the entire fulness; and which, so far as they have it at all, is derived to them by delegation only:—impossible as it may be in some cases, and difficult in all, to recall that delegation or reduce the powers conferred. For the considerations of policy, or even of right, which serve as restraints upon the Imperial Authority to legislate, afford no argument against the supremacy of that authority over all those derived authorities, according to the measure of the reservations made in the case of each particular delegation; and there is not one instance—not even that of the "Dominion of Canada," a dependency very near to independency, where some reservation at least has not been made of the supremacy of Imperial Parliament. A supremacy;—which it may not be always wise to exercise or assert, but which is founded in reason and the common law;—which was acknowledged throughout the long and changeful story of England's dominions beyond the "Four Seas;"†—and which has been declared by statute‡ to be a "full power and autho-

* Campbell *v.* Hall, Cowp., pp. 204, 212, 213. *S.C.* 20, How. St. Tr., pp. 327-329. Attorney-General *v.* Stewart, 2 Mer. 160.

† See for the foreign dominions of the Plantagenet and Tudor lines, Sir Francis Palgrave's "Original Authority of the King's Council," p. 3; I. Rot., Claus. Intr., p. xxviij, and I. Parl. Writs, p. 155 (44), p. 160 (158), and for the Thirteen Colonies, which afterwards became the United States of America. Story's "Commentaries on the Constitution of the United States," ss. 150—164. (1st ed.), Vol. 1, pp. 134—172.

‡ 6 Geo. III., c. 12.

"rity to bind the colonies and their people, subjects of the "crown, in all cases whatever."

I shall endeavour, hereafter, to shew how very reasonable it is that such a power should exist, even were the liberty of the subject the only sacred interest to be guarded from hasty or oppressive legislation, by bodies of persons little likely to be unbiassed by local prejudice, and not always facile to be made to understand,* that good and true "laws are deep and not "vulgar: not made upon the spur of a particular occasion for "the present, but, out of providence for the future, to make the "estate of the people still more and more happy: after the "manner of the legislators in antient and heroical times."

But, quite independently of Parliament and its supremacy, there were other reservations, expressed or implied in every grant of legislative power to every colonial dependency;—reservations of allegiance to the crown and the law, of protection by the Crown and the law, of the king's prerogative, of the liberties of Englishmen, of *Magna Carta*, of the Petition of Right, of the Habeas Corpus Act, and of the leading principles of the Revolution of 1688;—and, in fine, of all the natural and common law elements and grounds of the English Constitution itself. The "colonist" or "planter," was, before all and above all, an "English subject"—and his primordial, that is to say (*Prima Veneziono, e poi Cristiano*), his English rights and duties were paramount over all others.† The

* Lord Bacon's History of King Henry VII., (edited by Spedding, Ellis, and Heath.) Works, Vol. vi., p. 92.

†"Every colonist had the right to inhabit, if he pleased, in any other colony; "and, as a British subject, he was capable of inheriting lands by descent in "every other colony. The commercial intercourse of the colonies too was "regulated by the general laws of the British Empire, and could not be "restricted or obstructed by colonial legislation." Story's Commentaries on the Constitution, etc., *ubi supra*, sec. 178, pp. 164-5 citing (per Jay, C. J.) Chisholm *v.* The State of Georgia, 2, 47. 2 Dall. 470, 471. See also Story, *ubi supra*, secs. 159-164, 185, pp. 148, 170-2, on the same subject.

former were deemed to belong to "the common law;" and if, among the Acts passed by any local legislature, there was any which could be said to be "repugnant" to the common law, (or to the statute law, if in force within the colony) in any particular, it was deemed to be *ultra vires* and void. The merest "repugnancy" sufficed for this purpose; and, on the other hand, there existed no power anywhere but in the Imperial Legislature to supply the defect of authority, and make valid the enactment, null and void *ab initio*. Neither a preceding nor a succeeding "assent," or "allowance," on the part of the Crown, much less on that of its Secretaries of State could effect that; only an Act of Parliament could effect it.*

Within the last four or five years, it has seemed good to Parliament to enlarge the powers of certain colonial legislatures in this particular. From the 29th June, 1865, any colonial legislative assembly—out of India—if possessing a moiety of elected representatives of the people, may lawfully enact any measure which is not repugnant to some act of Parliament in force within the colony: and mere "repugnancy" to the law,—other than statute law,—will not invalidate such enact-

* Campbell *v.* Hall, Cowp. 204-209. Symons *v.* Morgan (Supreme Court of Van Diemen's Land, 29th Nov., 1847.) Parl Pa. (Comm. Ret. 566 of 1848, pp. 76-81, s.c., "Law Magazine and Review," (August 1867) Vol. 23. (N. S.) pp. 280-286. Clark's "Summary of Colonial Law;" (1834) p. 8, note 4. Upon the same principle it was very justly considered that the privilege, which a few plantations undoubtedly had, of passing their own laws, without the condition of any reservation to the Sovereign of the power of disallowing them when passed, did not impart any exemption whatsoever from the consequences of any excess of their delegated powers. "We are of opinion that, by the said Charter, the general assembly of the "said province have a power of making laws which affect property;—*that "it is a necessary qualification of all such laws that they be reasonable in them-"selves and not contrary to the laws of England;—and that, if any laws have "been there made repugnant to the laws of England, they are absolutely null "and void;*" Joint opinion of Yorke A.G., (afterwards Earl of Hardwicke, C.) "and Talbot S.G.,(afterwards Earl Talbot, C.), as to "Connecticut," August 1st, 1730. Chalmers, *ubi supra*, pp. 341, 342).

ment. Subject to that statute, however, the law remains unchanged; and, even where that statute is applicable, it cannot be said to have affected the question immediately before us. The objection of mere "repugnancy to common law," is one thing, the objection of "want of power" is another. When the Imperial Legislature relieved them from some restraints to which the former subjected them, it never intended to consecrate any usurpation in respect of the latter.*

Some attempt was once made to introduce an exception to that general doctrine, in favour of the King in Council. But the principles upon which it was based were too high to admit of that exception: no, not even in the special case of colonies acquired by cession or conquest. Over acquisitions of that kind the Crown was, by many lawyers, supposed to possess a high prerogative power to legislate; and that it possessed some prerogative power in that respect none could deny. But all were agreed that it was a power which might be departed with or lost. Even Lord Mansfield, than whom none rated the royal prerogative over the colonies higher, was very clear and emphatic as to that; and he so enforced it, as effectually to defeat the endeavour of the more zealous crown lawyers to make the prerogative inexhaustible by exercise, and perpetual in endurance. They confounded the use of terms, and read arbitrary for absolute; but Lord Mansfield understood otherwise the constitution. "If the king," were his words,† "(and

* "An Act to remove Doubts as to the Validity of Colonial laws," 28 and 29 Vict., cap. 63, sec. 1—6. Compare the express reservations in the Acts conferring legislative powers upon the East Indian assemblies or councils; and particularly that one of "the *unwritten* laws, or Constitution, "of the United Kingdom of Great Britain and Ireland, whereon *may* depend "in *any* degree, the allegiance of *any* person to the crown"—3 and 4 Will. IV., cap. 85, sec. 43; 24 and 25 Vict., cap. 67, sec. 22; which very fairly represents the common law doctrine on the subject;—if allegiance and protection be correlative.

† Campbell *v.* Hall, Cowp. 209, as collated with the other Report, in 20. How. St. Tr. 323.

"when I say the King, I always mean, in this case, the King, "without the concurrence of Parliament) has a power to alter "the old and to introduce new laws into a conquered country, "this legislation being subordinate—that is, subordinate to his "own authority as a part of the supreme legislature in parliament—he can make none which are contrary to fundamental "principles. He cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or "from the power of Parliament; or give him privileges exclusive of his other subjects. And so in many other "instances which might be put." It seems quite clear, therefore, that in order to determine whether a colonial Act, purporting to bind private rights, is, or is not, *intra vires* of the legislature which passed it, regard must be had to the objects of the Act, and the provisions for carrying them into effect. If these appear to be general, and applicable to the whole colony, the Act may be said to be *intra vires*. But if they are, in fact, adapted solely to a person or class, then the Act falls under the rule laid down, with no variation except of language, by the cited authorities, and ought to be regarded as one "contrary to fundamental principles,"—unless authorised by Act of Parliament,—and therefore void. There is nothing easonable in that rule, and it has always been followed in analogous cases. *Mutatis mutandis*, it became, in later times (by adoption from Lord Mansfield's cited judgment), the rule whereby to determine between the applicability to existing colonies of Acts of Parliament relating to property, and not expressly limited to this realm, nor yet expressly made to extend to any dominions beyond it.*

It would seem, therefore, that the question before us is determined already, against the competence of a provincial legislature to use, or rather to abuse, its delegation of powers to make laws to bind the whole community, by employing

* Per Sir William Grant, M.R., in Attorney General *v.* Stewart, 2 Mer. 158.

them in the confection of enactments derogatory to common liability or common right; that is to say, personal or special enactments, whereby privileges are created, or disabilities imposed, to the advantage or disadvantage of some person or persons, or some class or classes, exclusively of the rest of the inhabitants. And such indeed was the unanimous judgment of the long succession of great lawyers, who, during these last two centuries, at least, filling the offices of Attorney General and Solicitor General, were from time to time called upon by the crown to certify their opinion as to the validity and legality of the legislation of those derivative bodies; as it had been exercised in particular cases. In some of those cases, there was contained, in the enactment itself, an express reservation of the sovereign's veto, or power of disallowance. In others the power was by anticipation reserved already to the sovereign, by the Royal Charter or Act of Parliament, under which the legislative authority was claimed. But, constitutionally speaking, in no case could the sovereign interpose the veto, unless for cause;—and the only cause which was acknowledged to be adequate, was that of illegality. On the other hand, there were cases where no such veto, or power of disallowance, was reserved, either originally or by the local legislature, yet it existed. As in either of the two former classes of cases, so in this, the fact of the local assembly having exceeded its powers, was a fit occaison to warrant, nay, to require the Crown to exercise its own powers, and to disallow the void enactment. In all cases, those powers were exercised only upon the deliberate advice of its law officers. Their opinions were collected, unhappily without much effort at arrangement, by Mr. Chalmers, and whether we consider their numbers, their concurrence, or their personal distinction, we cannot wonder that "Chalmers' Opinions of Eminent Lawyers," have been always received as authorities in every English assembly where law is considered to be a science. From that compi-

lation I extract the following synopsis of precedents, bearing on my subject, and testifying to the universal practice, down, at least, to the period when it ceases.

Colonial legislatures, according to those authorities, cannot make any acts, whereby a political or civil disability or incapacity is imposed upon the subject—alien or natural—for that would be an invasion of the Queen's prerogative of protection.* They cannot take away proprietary rights, upon pretext of adjusting them to the measure of rules of State and policy: nor can they justify by such rules any act to the prejudice of third parties.† They cannot abolish the King's courts of justice,‡ nor create new courts or offices of justice.§ They cannot take away or intermeddle with the freedom of the Bar in relation to their clients and the right of retainer.‖ They have no power to enact the slaughter of runaways, nor to attaint even a negro slave, without giving him a day to render himself, even where charged as a robber.¶ The same principle deprives them of all power to enact indefinite or arbitrary imprisonments, of whatever kind;** and likewise that of superadding the aggravation of hard labour in the

* "Jamaica": Northey, A.G., July 9th, 1706, *apud* Chalmers, *ubi supra*, p. 350; "Virginia": West (afterwards Lord Chancellor of Ireland), Jan. 16, 1723. *Ibid*, pp. 439, 440.

† "Jamaica": Fane, March 3, 1725-6. *Ibid*, pp. 357, 359.

‡ "Jamaica": Ryder, A.G. (afterwards Chief-Justice of England), and Murray, S.G. (afterwards Earl of Mansfield, C.J.), June 22, 1753. *Ibid*, p. 434.

§ "Massachusetts Bay": Northey, A.G., April 21, 1703-4. *Ibid*, p. 195. "Barbados": West (afterwards Lord Chancellor of Ireland.) June 18, 1720. *Ibid*, pp. 196-8.

‖ "Jamaica": Eyre, S.G. (afterwards Chief-Justice of C.P.), May 12, 1710. *Ibid*, p. 401.

¶ "Barbados": Northey, A.G., October 20, 1703. *Ibid*, p. 509. "Virginia": Northey, A.G., 1701. *Ibid*, p. 407.

** "Barbados": Rawlin, A.G., *ubi supra*. *Ibid*, p. 377.

case of a debtor in execution, or civil prisoner, and the hiring out the labour of such prisoner against his will.* They cannot impose a tax or duty on any importation of goods belonging to British subjects, in the nature of a burthen upon trade.† Not only have they no power to pass Acts for creating a currency, or a paper credit, or changing or adding to the laws relating to either of those matters;‡ but if they attempt it, their members, actually taking part in such attempt, incur the penalties of a high misdemeanour, and the franchise itself, if holden under Royal grant, may be seized into the Queen's hands.§ Lastly, matters cognisable in, or belonging to, the Admiralty jurisdiction, are beyond their own; and all enactments of theirs relating thereto are *ultra vires*, and encroachments upon the prerogative, and the authority of Parliament, and must therefore be held to be contrary to law.‖ And greatly as the detestable institution of slavery, whilst recognised by English and British Acts, did, no doubt, qualify as between master and servant, the value of those safeguards, yet neither colour nor descent was ever suffered to make, amongst the free, any distinction whatsoever. "I "agree," writes West, afterwards Lord Chancellor of Ireland,¶ "that slaves are to be treated in such a manner as

* "Bermuda": Harcourt, S.G. (afterwards Lord Chancellor.) Dec. 6, 1703. *Ibid*, pp. 411, 412, 414.

† "Carolina": Thompson, S.G. (afterwards Baron of Exchequer), April 5, 1718. *Ibid*, pp. 586, 587.

‡ "All the Plantations": Northey, A.G., October 19, 1705. *Ibid*, p. 611. "Pennsylvania": West, May 10, 1725. *Ibid*, pp. 441, 2. "Carolina": Sir M. Lamb, Dec. 14, 1748. *Ibid*, pp. 426, 428. "New Jersey": Ryder, A.G. (afterwards Chief-Justice of England), and Murray, S.G. *Ibid*, pp. 447-8.

§ "All the Plantations:" Northey, A. G., *ubi supra*.

‖ "Barbados;" Northey, A.G., October 20, 1703. *Ibid*, p. 410. "All the Plantations:" West, June 20, 1720. *Ibid*, pp. 511-521.

¶ "Virginia:" West, Jan. 16, 1723. *Ibid*, pp. 439, 440.

"the proprietors of them (having a regard to their number) "may think necessary for their security. Yet I cannot see "why one freeman should be used worse than another, merely "upon account of his complexion. . . . . It cannot "be just, by a general law, without any allegation of crime "or other demerit whatsoever, to strip all free persons of a "black complexion (some of whom may, perhaps, be of con- "siderable substance) from those rights which are so justly "valuable to a freeman."

Of late, however, there has been made a serious attempt to call in question the doctrine so laid down; and with them the principles of law on which it is established, and the precedents which confirm and illustrate it. The objection, however, is not, so far as I can gather, founded upon anything beyond a fancied analogy between the attributes of the Imperial Parliament and those of each one of the colonial legislatures. However petty and insignificant the legislature or its subjects, still, they say, it is a legislature, and they are its subjects. What powers the Imperial legislature possesses, are, *ex vi termini*, delegated to the local legislature, when constituted after its model. And the practice of the mimic parliaments can be shown to have, in many cases, been answerable to that general pretention. I believe that this is in substance what the objectors allege against the antient doctrine, which I have endeavoured to explain and defend.

The objection reposes upon two false premisses—premisses which have been already shewn to be false: viz., first, that the model of any local legislature is in all respects the Imperial Parliament; and, secondly, that it has been so recognised in the practice.*

I perceive that no authority is cited for the first proposition

* With reference to both points, but especially the first—the case of Kielley v. Carson, 4, Moo. Pr. C.C., 63, may be usefully considered.

—it is an assumption, and nothing more. I shall, however, return to it presently. In the meantime the very ample and conclusive authority which I think to have produced already, should suffice.

The second fallacy is one of language. It is not said what practice is meant:—that of lawyers and courts? or that of those colonial assemblies and councils, for which the objectors claim the supposed equality with Imperial Parliament? But the whole course of English jurisprudence runs counter to the claim: and I have already shewn that the practice of English lawyers and English courts of law has been answerable. It should, therefore, be a matter of indifference, what the colonial practice may have been, whether in this colony or in that, or in all the colonies; unless authorised by the express letter of Act of Parliament, or otherwise capable of being reconciled with the law. But in truth, there is no allegation that any practice such as that asserted is, or has been, the general practice of colonial assemblies. The contention only goes to this, that a few of them have asserted and exercised a power—but to what extent we are left in the dark—of "private legislation." In Jamaica* that has been done;

* On the 29th June, 1827, the Royal Commission of Enquiry into the Administration of Civil and Criminal Justice in the West Indies, presented the first of their second series of Reports, in which (supplementing a scanty passage in page 6 of their first Report (O.S.) on Jamaica) they give the Attorney-General's written examination on the practice of private legislation. As this jejune passage, and that contained in my next note, are all the information which is contained, on the subject, in any of the reports of that learned Commission, I think it right to print them in full: "All Private Acts, "except Acts granting manumission, and certain Public Acts, have a sus- "pending clause, by which it is declared they are not in force until the "Royal Assent is given. . . . With respect to Private Acts, every "person is bound to take notice of it as a record. . . . Of Private Acts "the Court is not bound to take cognisance, unless they are pleaded or "given in evidence."—*First Report*; (*Second Series*) *Examination of the Attorney-General of Jamaica*; *pp.* 182-3.

and in the Bahamas;* and there may be other instances not adduced. These "Private Acts" so passed have been invariably reserved for the sanction of the Sovereign. What answers such references have always elicited during the last eighty years—for, as I have already shewn, the cases upon the question contained in Chalmers' "Collection" are altogether against the pretention—I am unable to state. But the few which I have met with are quite in conformity with the former practice; and I suppose that the same observation applies to those which I have not seen, especially since the contrary is not asserted. Yet, although the fact of the Royal assent being given to any such Acts be made—and it has not been made—to appear, that cannot, as I have shewn, affect the question as to the validity of the Act,—if made before,—for being *ultra vires* of the legislature which passed it. Neither that sanction, nor yet the lapse of time, nor length of user, nor acquiescence (unless by force of a statute), can cure the invalidity of the act, or impair the power of the courts to declare that invalidity. For more than forty years, a North Carolina act passed in 1715 had been in force and submitted to; whereby was postponed the execution within that province of all judgments for "foreign" debts, and priority was given to all "country" debts. Nevertheless when, in 1747, it came under the consideration of the English Crown Law Officers, Sir Dudley Ryder, A.G., and Sir William Murray, S.G., it was incontinently disallowed; as "contrary to reason, inconsistent "with the laws; greatly prejudicial; and therefore "unwarranted by the charter; and consequently void."†

* "With regard to Private Acts, as they contain a clause suspending their "operation until the pleasure of His Majesty shall be signified, whenever "the Governor receives His Majesty's consent to any Private Act (and "which consent is made known by an Order of the King in Council) he "promulgates such assent of His Majesty by publication in the *Gazette* of "the Colony."—*Bahamas: Examinations of Public Functionaries. Ib. p.* 116.

† "North Carolina." June 3rd, 1747. Chalmers, p. 402.

I think that it will be found that, by the term "Private "Acts," the official witnesses, in their written examinations above cited, meant "Personal Acts" and "Estate Acts." Of both of these kinds I shall presently speak more at large. Of both of them I will content myself, for the present, with observing that, whatever may have been the pretentions of West Indian legislatures in particular, or colonial legislatures in general, in those respects, they have never ventured —at least not during the last one hundred and fifty years—to claim to themselves the power to attaint, or to bastardise, or to divorce, on the one hand, or to legitimatise on the other,— or in any respect to change for better or worse the *status* of a single free person being a natural born subject of the Crown.*

Again, with respect to naturalisations, there was not the same hesitation to interfere. It was, for many reasons, important to ascertain and enforce a certain equality of burthens amongst the actual inhabitants, and also to allure new immigrants, by the prospect of a corresponding equality of the advantages of inhabitancy. Accordingly, we find from time to time before the passing of the Aliens' Colonial Naturalisation Act† a small number of references, from various parts of the British Colonial Empire, to the Colonial Office, of acts for naturalising certain aliens, or all aliens, within the local limits of the particular colony, and reserved for the Royal assent. It appears to have been assumed that, in every colony or foreign dominion whatsoever of the British Crown, the disability of alienage was as much a part of the territorial law as it

* Manumission acts formed no exception to this rule. Slaves were chattels of the master, not subjects of the Crown. The master might manumit by instrument, whether in the form of a deed or of a private act. It took effect by virtue of his absolute will in either case; *i.e.*, his will as donor, or his will as party to a legislative contract. Such Acts, therefore, were not reserved (in Jamaica at least) for the Royal assent (*suprà*, p. 412 *n.*) If they had, they could have obtained but one answer.

† 10 and 11, Vict., c. 83.

undoubtedly was, until very lately, a part of the territorial law of England. But that fallacy, I apprehend, may now be considered to have been for ever exploded, by the celebrated judgment of the Judicial Committee in the case of the Mayor of Lyons *v.* the East India Company.* It was a statutory disability and nothing more, even in England. It was unknown here until the passing of the *Statutum de Prærogativa Regis.*† That Act,—limited in terms to the disabling aliens from taking lands in England by inheritance, but extended, by a liberal interpretation in the interest of the King's Fisc, to the disabling them from taking freeholds by purchase also,—was still further extended, by a series of later Acts, to the disabling them almost from breathing the breath of life. Those later Acts are now repealed,—some absolutely—others, I fear, very ineffectually,—by reason of certain novel reservations introduced of late into Acts for the repeal of Obsolete Statutes.‡ But if the chapter in the *Statutum de Prærogativa Regis* which relates to aliens, remained in full force to this day in England,—according to a well recognised principle of jurisprudence,§ nevertheless,—neither it nor any of those antient Acts was ever considered to be in force within the English

* 1 Moo. Ind. App. Ca. pp. 272-287.

† *Statut. incert. temp.*, c. 14, in "Statutes of the Realm," Vol. I., p. 226 a.; 17 Edw. II., c. 12 of the common editions.

‡ *E. g.* 1, Ric. III., c. 9, "Statutes of the Realm," Vol. II., p. 492, repealed by 3 Geo. IV., c. 41 (s. 2). 32 Henr. VIII., c. 16, s. 4 (or s. 13 of common editions.) *Id.*, Vol. III., p. 766, repealed (except as to "principles contained therein," and as to England only) by 26 and 27 Vict., c. 125. Compare with the enactments against aliens the earlier records as to particular cities and places; *e.g.*, the *Statutum de Civitate Londoniæ*, 13 Edw., I. whereby alien residents were not only allowed, but required to become free of that City;—"Statutes of the Realm," Vol. I., p. 103.

§ Attorney General *v.* Stewart, 2 Mer. 159-161, 163-164. Mayor of Lyons *v.* East India Company, 1 Moo. Ind. Ap. Ca., pp. 272-287, 1 Bl. Comm. Introd., S. 4, p. 100.

colonies. There the old equality of the common law with respect, not only to tenure, but to personal, municipal, and political rights, still subsisted; except so far as—within the North American colonies only—the jealousy of French encroachments in that quarter had, towards the middle of last century, and from thence down to the War of Independence, induced the Imperial Parliament to impose a number of vexatious and increasing restrictions upon colonial intercourse and trade, and amongst others, some relating to that very question of local naturalisation.* It would be wonderful, indeed, if the Crown had allowed those parliamentary fetters to be relaxed by colonial hands. Accordingly we find that, in all the colonies to which those statutes applied, every attempt to relieve from the incapacity which they created, by local legislation, was immediately met by disallowance; whilst the other colonies, in which the liberty of the common law was not interfered with by those statutes, neither perceived any necessity for passing naturalisation acts, nor were prevented from extending to their alien sojourners what hospitality they would. I ought to add, that this very obvious explanation of the indifference, with which the occasional attempts of the North American legislatures to admit aliens were received by the English Law Officers, before the passing of the Acts of the Second and Third Georges, has escaped Mr. Chalmers. His collection, notwithstanding, contains one opinion† in which that indifference is very apparent; and it is the only one, on either side of that question, of earlier date than the first of those statutes. But the new constitutional principle which they introduced elicited very different opinions. The nullity of colonial

*4 Geo. II., c. 21, 13 Geo. II., c. 3 (s. 3) and c. 7 (s. 6) 20 Geo. II., c. 44 (ss. 5 and 6), 22 Geo. II., c. 45 (ss. 10 and 11), 2 Geo. III., c. 25, (ss. 2 and 3), 13 Geo. III., c. 21 (s. 2) and c. 25.

† "New Jersey;" Thompson, S. G., March 5, 1718-19; Chalmers, p. 333.

naturalisations, even in the colonies where they were passed, was asserted by the highest authority :* and we read that, from the accession of George III. the Governors themselves had uniformly refused to assent to any such Acts, in obedience to their "general instructions" received from that King.† But the practice did not rest there. I find traces of an occasional practice—of disallowing attempts from some of the other colonies to pass measures for the regulation of their own alien laws—although the practice was far from being uniform. Thus, whilst in 1835, the superfluous power to grant "Letters "of Denization" to aliens was allowed to be assumed by the legislature of Van Diemen's Land,‡ a similar assumption, twelve years later, on the part of the Hong-Kong legislature, of the same superfluous power§, received its disallowance. Never was a more signal proof afforded of the fidelity of the Home Authorities to that policy of which I have presented the main points. The Imperial Act,—for giving validity to every existing colonial naturalisation in every colony, and for empowering naturalisations by the local authorities in every colony for the future,—received the Royal assent on the 22nd of July,‖ 1847 :—and, as it was to take immediate effect, it was at once signified to the Governors of the various colonies for their guidance. At that very time, there had been "lying over," in the Colonial Office, for a year and a half past, the Hong-

* "New Jersey :" Ryder, A. G., and Murray, S. G., July 21, 1749 *Ibid.* p. 448.

† Chalmers, p. 661 ; compare *Ibid*, pp. 648, 665.

‡ "An Act for enabling the Lieutenant-Governor to grant Letters of "Denization in certain cases," 5 Will. IV. ("Acts of the Lieutenant-"Governor and Council of Van Diemen's Land,") No. 4.

§ "An Ordinance for the Naturalisation of Aliens within the Colony of "Hong Kong and its Dependencies," 9 Vict., No. 10, of 1845 :—"Laws of the "Colony of Hong-Kong," p. 226.

‖ "An Act for the Naturalisation of Aliens," 10 and 11 Vict., cap. 83.

Kong Ordinance in question ; passed on the 1st October, 1845, but subject to the Queen's pleasure. If it had not reserved Her Majesty's pleasure, that Ordinance would have been in force within Hong Kong from the time of its passing, and down to the time of the passing of the Imperial Act. In that case it would have had the benefit of the general provisions of that Act, whereby all then existing Acts of that kind passed by colonial legislatures were recognised and established.* The same consequence would have followed if, immediately before the passing of the Imperial Act, the Royal pleasure had been signified in that sense. That, however, was not done ; for that would have been to recognise the assumption of the Hong-Kong legislature to legislate at all in the matter. It was, therefore, signified to be the Queen's pleasure to disallow the local Act. But, along with that despatch, there was enclosed, for the guidance of the local legislature, a copy of the new Imperial Act, empowering them, if they pleased,† to pass their Act again, and give it the force of law. Both facts—the disallowance and the new statutory powers,—were notified by the same "Proclamation," of the 1st January, 1848, and recorded in the authorised collection of local laws.‡ But it was not until five years later that the local legislature was induced to exercise those new powers, by passing a new Ordinance (which is yet in force) "for removing "doubts regarding the rights of aliens;"§—doubts which, I must repeat, had no countenance from the law, had never been regarded in practice, and ought not to have been raised.

Upon the whole, therefore, I think that the particular case of Colonial Naturalisation Acts was no anomaly, nor yet unsus-

* *Id.*, S. 1. † *Id.*, S. 2.

‡ Laws of the Colony of Hong-Kong (1856), pp. 226, 228.

§ Ordinance No. 2 of 1853, "for the removal of doubts regarding the rights "of aliens to hold and transfer property within the Colony of Hong-Kong." *Ibid*, pp. 389, 390.

ceptible of explanation. At any rate, it certainly neither deserves now, nor did it ever deserve, to be accounted an exception to the universal incapacity of the local legislatures to deal with questions of personal *status*.

That incapacity, so far as relates to certain American colonies, — (which, having outgrown colonial dependence, became, within the last two years,* "federally united into "one dominion, under the Crown of the United Kingdom of "Great Britain and Ireland, with a constitution similar in "principle to that of the United Kingdom,"† is now removed, but so far only as relates to the questions of *status* therein specified, and no other; that is to say "Indians;" "Naturalisation and Aliens;" and "Marriage and Divorce;"‡ subject however (as to the latter) to an "exclusive" power of legislation reserved to each "provincial legislature," over "the solemnisation of marriage *in the province*;"§ and also subject (as to all) either to the "Royal assent being withheld," in the case of Acts reserved for the Royal pleasure, or (in the case of Acts not so reserved) to their "being disallowed by the Queen in Council," within two years after receipt by the Secretary of State.‖ But, as to all other cases, the incapacity to affect the personal *status* of a single colonist by its legislation, must be considered to be,—quite as much now as it was before the "dominion" began,—a condition in

* "The British North American Act, 1867," (30 and 31 Vict., c. 3) received the Royal assent on the 29th of March, 1867, and was made executory within those provinces (sec. 3) by Royal Proclamation on the 21st of May following. For the powers of the Canadian Parliament before that period, see the 3 and 4 Vict., c. 35;—as amended by the 16 and 17 Vict., c. 21, the 17 and 18 Vict., c. 118, and the 22 and 23 Vict., c. 110.

† 30 and 31 Vict., c. 3 (Preamble).

‡ *Id.* s. 91, cl. 24, 25, 26. Is it meant that the same effect is to follow, in every part of the world, upon Canadian Acts of these kinds, as if the Imperial Parliament had passed them? It would so appear: (and compare s. 92.)

§ S. 92, cl. 11. the last note. ‖ S. 55, 57, 90.

restraint of the local power to legislate. *Exceptio probat regulam, in casibus non exceptis.*

The general powers, which—Western Australia alone excepted—allthe Australasian legislatures now possess,* are very similar to the general powers of the Canadian legislature; only that, of the former, each possesses its own as representing a "colony," not a "dominion." But, with respect to the specific question before us, it is very clear that the difference between them is very wide. The "colonies" of Australasia have received no delegation of such powers of personal legislation as was lately granted to the "dominion" of Canada. They remain, therefore, except so far as it is qualified by the express letter of our statutes, under the general rule of incapacity in that regard; and I notice with pleasure more than one recent instance of their having had the good sense to confess it.†

* As to New South Wales, Victoria, South Australia, Western Australia, Queensland, and Tasmania, see the "Act for the Better Government of Her Majesty's Australian Colonies," (13 and 14 Vict., c. 59), and the Acts 5 and 6 Vict., c. 76, and 7 and 8 Vict., c. 74, therein recited; the Acts for explaining the same (25 and 26 Vict., c. 11, and 29 and 30 Vict., c. 74); the "New South Wales Government Act," (18 and 19 Vict., c. 54); the "Victoria Government Act," (18 and 19 Vict., c. 55); the "Queensland Government Act," (24 and 25 Vict., c. 44); the "Act to Confirm Certain Acts of Colonial Legislatures" (26 and 27 Vict., c. 84); and the "Act to Remove Doubts as to the Validity of Colonial Laws" (28 and 29 Vict., c. 63). And, as to New Zealand, see the "Act to Grant a Representative Constitution to the Colony of New Zealand," (15 and 16 Vict., c. 72), as amended by the 20 and 21 Vict., c. 53, the 25 and 26 Vict., c. 48, the 26 and 27 Vict., c. 84, and the 28 and 29 Vict., c. 63.

† The legislature of New Zealand, for example, has declined to bring into operation its recent Act relating to the Law of Divorce, before obtaining the opinion of the Crown Law officers here as to its being *intra vires* to legislate on that question. (Letter of 17th October, 1867, from Wellington, New Zealand, in the *Times* newspaper of the 18th December, 1867.) Yet the legislation had been invited by Secretary Lord Stanley's Circular Dispatch of 1858. The same legislature, and those of Australasia generally, have

For it is not a little curious that the two latest recorded instances of insubordination to that general law, occurred not many years ago in an Australasian colony; in one which was the least of the group; in one which possessing no elective legislature, but only one nominated by the crown, could not have claimed the benefit of the very slight exemption afterwards accorded to some elective legislatures by the Act already cited of the 28th and 29th Vict., cap. 63; even if that Act had then been in existence. We are accustomed to look for such cases of insubordination in colonies possessing elective legislatures; not in colonies governed by the Crown, with the help of a legislative council of its nominees. In Van Diemen's Land, the colony in question, our experience is exactly reversed. It is since the extention of free institutions to that island, in common with her more powerful neighbours, that her and their legislation, has been so remarkable for its entire conformity to the fundamental laws of the empire. It was whilst the legislative function was wholly in the hands of the Executive Government, that the previous attempts to usurp imperial power and proprietary rights were made; the first of the two, by the colonial government acting under the direct sanction of the Secretary of State; the second by the former alone; but both alike defeated, by the only means which the subject there had of opposing the invasion of private right in those times,—recent as they are—enjoyed,—an English Bar and an English Supreme Court. I will state the main points of both cases very briefly. The records and documents in the Colonial Office and the proceedings of Parliament contain very ample details [illegible], and are easily accessible.

Questions of strictly legal and equitable jurisdiction con-

refrained from authorising the naturalisation of aliens, except within the limits superfluously enacted by the 10 and 11 Vict., c. 83, elsewhere noticed. (Letter, etc, *ubi supra.*)

cerning the *jus patronatûs* to a church and glebe at Bothwell, in Van Diemen's Land, and even to the freehold of the soil itself on which the Church stood, and of which the glebe was parcel, were pending in 1840 between the following parties. (1) The Scottish Presbyterian Church of the Island, who were in sole possession; who had been in sole possession from the beginning; and who had been recognised by Minutes of Executive Council, and scheduled in the local Church Act of 1838* as such sole possessors. (2) The Protestant Episcopalian Church of the island; one or two of whose ministers had occasionally been allowed by the Scots ministers to perform Anglican worship within the church there for the benefit the few Church of England men, no other suitable building in Bothwell being adapted for a place of worship. (3) The minority in question, who claimed no more than a joint right of user with the majority. And (4), a neighbouring proprietor, who claimed, by title paramount; in respect of the soil being, as he alleged, within his boundaries, and not those of Bothwell township. Of these four claimants the last threatened to

* "The Acts of the Lieutenant-Governor and Legislative Council of Van "Diemen's Land," Hobarton, 1840. "An Act to make provision for the sup- "port of certain Ministers of the Christian Religion, and to promote the "erection of places of Divine Worship," 1 Vict., No. 16. By that Act (ss. 1, 2, 12-15) contributions out of the Colonial Treasury were to be made for the salaries of ministers, and for erecting places of worship and ministers' dwellings for all Christian Denominations, on certain conditions as to their numbers respectively, and in certain stated proportions to the contributions subscribed by the respective congregations; and provisions for the self-government of each denomination in respect of those endowments or gifts were made (ss, 3–11, 17). All ministers' glebes and salaries existing at the passing of the Act, in respect of the places of worship named in the schedule, were saved and confirmed (s. 16). All existing, and all future places of worship, and ministers' dwellings, in erecting which any public monies had been or should be raised, were to "be and continue to be for ever dedicated "to the purposes, and holden solely for the uses, and be appropriated to the "service, of the particular religious denomination for which such buildings "were erected originally" (s. 3).

commence litigation; the second and third formally declined to commence it; and the first, who stood upon actual possession, of course had no other position than that of defence, to take when attacked. The legislative council, under these circumstances, was suddenly convened by the Lieutenant-Governor to hear and consider a despatch, from Secretary Lord John Russell, and the draught of a Bill reciting it; whereby all and sundry, except the Anglican Church, were to be divested of all claim to the property in dispute; and vesting it in the latter, subject only to a right of lien for what sums could be ascertained to have been expended upon the fabric, by the Scots, in 1830-1831, when they, with some Government aid, erected it.* No consent was obtained, nor, I

* The Bill, after reciting the third section of the "Church Act," and the pending disputes, went on to recite as follows:—"And whereas His Excel-"lency, the Lieutenant-Governor of this Colony, has recently received a "dispatch from the Right Honourable H.M.'s Principal Secretary of State "for the Colonial Department in England, conveying Her Majesty's most "gracious will and pleasure that the said Church should be holden solely "for the uses, and be appropriated to the service, of the members of the "United Church of England and Ireland residing within Bothwell afore-"said, and that the members of the Church of Scotland should have and "are entitled to, a lien or charge on the said Church, for the sum of £ , "being the amount of their original contribution towards the erection of the "said Church." The enacting parts (ss. 1 and 2) were an echo of the recital —except that, by a curious perversity, the benefit of the offered "lien" was given (s. 2), not to the "members of the Church of Scotland" at Bothwell, but to "the officiating minister for the time being" of a Presbyterian Church at Hobarton, sixty miles distant. It happened, also, that the minister actually officiating there was the most active of the opponents of the Bill, and had beforehand presented a separate petition against its introduction, on the first rumour of its being intended, in his official capacity of "Moderator;" praying the Council to ordain that the threatened "interfer-"ance with the proper province of the legal tribunals," might not take place, as "it would form an illegal and dangerous precedent;" and "to leave the "question to which it appertained to be decided by the legal tribunals of "the colony."—Draught Bill, 4 Vict. No. , entitled "An Act declaratory "of the rights of the Members of the United Church of England and "Ireland to the exclusive use of the Church at Bothwell." (James Barnard,

believe, asked, on the part of the other claimants:—and, on that of the Scots Church at least, a formal "Protest and "Declaration"—addressed to the legislative council, and signed by the Moderator, and also by the procurator and agent of the Presbytery of Van Diemen's Land,—"that the "said Presbytery was in no way a party, or to be considered "a party to the Bill,"—was presented and read.* They were allowed to be heard by counsel in support of their "Protest "and Declaration;" and their counsel availed himself of the opportunity to point out the entire competence of the Supreme Courts, and their entire incompetence to deal with the case;—the finiteness of the functions of colonial legislatures in general, and of that one in particular,—the nullity of Acts passed in excess of those functions;—the "repugnancy" of their proposed legislation to natural justice, to common law, to private right, nay, even to the statute law itself;—for Chapter Twenty-nine of the Great Charter, against disseisin, or ouster of freehold, and so forth, *nisi per judicium parium et per legem terræ*, was certainly a statute. These views were enforced by the Chief-Justice himself, when, at the close of the hearing, a vote was called for on the first reading of the Bill; and he alarmed the few landed proprietors in the council by pointing out the danger of such a precedent. The government having failed by one vote to obtain a majority,† prorogued the legislative council, and referred home for instruc-

Government printer, Hobarton, 1840; pp. 1—3). "Petition, etc., from the "Rev John Lillie; ordered by the Council to be printed; 7th September, "1840;" and "Minutes of Proceedings, etc., and Evidence in the Case of "the Bothwell Church Bill," 22nd, 23rd, 24th, 25th, and 26th, September, 1840." Ordered by the Council to be printed, 26th September, 1840; pp. 1—46.

* "Protest to His Excellency in Council, etc.;" ordered to be printed 24th September, 1840. Proceedings, etc., *ubi supra*.

† Proceedings, etc., 23rd, 24th, 25th, and 26th, September, 1840, *ubi supra*, and "Evidence," etc., pp. 46 to the end. The votes were equal.

tions. Lord John Russell and the Colonial Department, after advice from the Attorney-General (Sir John Campbell), and the Solicitor-General (Sir Thomas Wilde), became aware of the necessity of staying their hands. The illegal proceedings were not resumed; and the Scottish settlers were left in possession. Indeed I believe that their possession to this hour remains undisturbed.*

The other case is later in date, and of much graver interest:—

On the 29th November, 1847, the same learned Chief-Justice, the late Sir John Lewes Pedder, and the late Mr. Justice Montagu, the other member of the Supreme Court of Van Diemen's Land, delivered their judgments, in Bank, upon an appeal† against a conviction at sessions, for nonpayment of a tax or license duty imposed by an enactment of the local legislature upon owners of dogs.‡ The appellant's first and main ground of appeal was that "the Act of council was not "law;" being "void, either as an excess of the powers given "to the legislative council, or because it was directly re-"pugnant to the provisions of the Act of Parliament§ con-"ferring those powers." The Supreme Court held it to be void upon both grounds, and for the following reasons:—The cited provisions of the Act of Parliament expressly provided, that no tax should be imposed, unless it should be found necessary for

* A few further particulars of this case are to be found in "Van Diemen's "Land under the Prison System," in the "Dublin Review," for November, 1841, Vol. XI., pp. 470—473.

† See the judgments in Symons *v.* Morgan—Supreme Court, Hobarton;—as reported by the judges themselves in the (Commons) Paper "relating to Van Diemen's Land" (Parl. Pa. 566 of 1848), pp. 75, 81: and see the report of the same case in the "Law Magazine and Review" (new series); Vol. XXIII., pp. 280-286.

‡ "An Act to restrain the Increase of Dogs," 10 Vict., No. 5, of "Acts, &c., of Van Diemen's Land."

§ 9 Geo. IV., c. 83, ss. 21, 25.

some local purpose; and that, if so imposed, the tax should be expressly appropriated to such purpose by the very terms of the Taxation Act. In the case of the Dog Tax Act then in question, this express appropriation had not been made; the only provision as to that being, that it should* "go and be "applied in aid of the ordinary revenue of the colony." It was true that the Court, albeit empowered to do so by the Act of Parliament,† had not suspended the enrolment of the Act; by making, within the fourteen days after transmission for enrolment, the statutory representation to Government of the repugnancy and illegality in question; those grave objections not having at that time suggested themselves. But their omissions in that respect must not prejudice the subject, nor make valid an excess of powers, when committed by "an in-"ferior legislature," having no powers of its own, save those which, under certain limitations and restrictions, were conferred by that imperial statute.‡ Even had their attention been called to that difficulty, and they had refused to enrol the Taxation Act, until it was removed,—that would not have prevented the Legislature from insisting on the enrolment:—the judicial power of remonstrance had the effect of suspending only *pro hâc vice* the enrolment;—it could not be repeated;—and, in the end, they would still have had to consider and enforce the great constitutional doctrine, that every condition, inseparably annexed to the delegation, must be strictly pursued by the depositary of the delegated power to legislate, under that pain of nullity which it was the duty of the Queen's Courts to enforce in case of nonobservance.§ And, although their Honours admitted that "they had official notice by the *Gazette*, that Her "Majesty had approved of the Act of Council in question," yet they conceived that this made no difference whatever, as

* Act of the 10 Vict. No. 5, s. 7.

† 9, Geo. IV., c. 83, s. 22. ‡ ss. 20, 21, 25.

§ Davison *v.* Gill, 1, East, 63, and cases in Chalmers: *ubi supra.*

to its validity or their duties in regard to it. The Queen had no further powers of approval than were expressly conferred by the Act. In cases not coming within the letter of those powers, the Royal approval was wholly without effect. The conviction was accordingly quashed.

I presume that the advice, which the great law officers of the Queen gave Her Majesty, as to the course to be pursued by the Secretary of State under those circumstances, was strictly conformable with the judgments of the Hobarton Supreme Court. The colonial authorities had proceeded to the length of calling the Chief-Justice and his colleague to shew cause—before the Governor in Executive Council—why they should not be suspended for their doctrine;—and "cause," in the shape of the two written judgments embodying that doctrine, was accordingly shown;—and every offer of the local government to induce a compromise was honourably and inflexibly declined.* The Secretary of State, therefore, found himself called upon for his opinion;—and presently it became the concern of more than the Secretary of State. A petition, from 1570 colonists of Van Diemen's Land, emphatically adhering to the constitutional doctrine of their Supreme Court,† was graciously received;—and a Parliamentary censure was only averted by an unusually ample "communication of "the papers," and a promise, which was duly fulfilled, that the Governor should be admonished, and that his obnoxious proceedings in the Executive Council should be stopped.‡ I must repeat my opinion, that the true meaning of the action, thus taken by the home authorities, is to be found in the fact, that those most competent to decide the question of law had

* Minutes of the Executive Council, etc. (30 Nov. 1847), in Commons' Paper (*ubi supra*), pp. 56, 58, 59, 62, 63, 65—72.

† *Ibid.*, p. 111.

‡ See the "Law Magazine and Review" (new series). Vol. XXIII., pp. 285, 286.

advised them of their own entire concurrence with the Hobarton Supreme Court.

Returning now to the ambiguous words of the West Indian Commissioners' Reports above referred to,—what value the mention of the Jamaica and Bahama practice in regard to "private Acts" may have, must appear very trifling. If I might hazard a mere conjecture, I would say that the only "private acts" intended are either (1.) some antient naturalisation acts which I have already shown to be utterly superfluous, and therefore not worth the trouble of disallowance; or (2.) the ordinary estate acts—that is to say, acts for settlement or resettlement of limitations of estates,—freely consented to by the actual parties, and fully reserving every *jus tertii* whatsoever. If that be all that was meant, I need not linger over the Reports of that West Indian Commission. But if more were meant, then I venture to say, for the reasons already asserted, that, be the form or method of West Indian procedure what it may, all that further private legislation there was illegal, and those other "private acts" of the local legislatures were *ultra vires* and void. I do not even think that they deserve to be taken into account, even as evidencing a practice, at variance with the long and otherwise unbroken concurrence, of colonial opinion and colonial practice, with the judgment of authority, and with constitutional precedent.

Still that practice may have existed. We know that many very deplorable and even shocking deviations from duty, and encroachments upon the rights of the subject the lawful prerogatives of the Crown, and the power of Parliament, are recorded in the two series of those learned Reports. But, except the peculiar case of the slave, I discover none which belong to my present subject, any further than as they serve to illustrate the unfitness of those local legislatures to deal with any constitutional questions, and the strong probability, that every instance of such legislation, unchecked by the Courts,

will be drawn into precedent. Thus we find the assembly of the insignificant colony of Montserrat justifying one encroachment of the Constitution under—"the custom of the island—"that venerable unwritten law," as it absurdly stiles what may have been a practice unhappily connived at by—or perhaps unknown to—the Home Government; and justifying another, by the astounding allegation that "civil justice was, by "common consent, for a short time suspended."* In another West Indian colony, the example offered by the local legislation, as described in "the written answers of the "Magistrates and public officers," is still more striking. They inform the Commissioners that,—whilst they do not deny that their settlement is governed by "the English common law "and the statutes declaratory thereof,"—still, "in the event "of illegal imprisonment," the only remedy is "damages";—(to be recovered, as it seems, by the Provost-Marshal-General), and that "the writ of Habeas Corpus is unknown."†

With many such instances as these before us, it is very possible that, amongst the very serious vices by which the old methods of West Indian legislation, in general, undoubtedly was tainted, that enormity, against which my observations have been directed, is to be ranked. So far as their "Acts of Assembly" were accessible to the Commission of Enquiry, the provisions of those enactments were found, both in respect of letter, and spirit to be "crude and barbarous," or "otherwise highly censurable." Nor was the censure spared.‡ It

* Reports of the Royal Commission of Enquiry into the Administration of Civil and Criminal Justice in the West Indies. First series, Third Report (1825), p. 36.

† *Id.*, Second Series; First Report (1829), p. 4 (Honduras) and "Written "Answers," 20, 45, in appendix to same, pp. 84, 86.

‡ See in particular Third Report, First Series (Tortola), pp. 81, *et seq.* At the close of the first series of Reports, the Commissioners, after referring to the whole series, and the annexes,—which contained "the examinations of "the chief persons administering the laws, and the returns of the public

further lamented that so many of those same enactments, albeit considered by the local authorities to be enforceable at pleasure, were almost inaccessible to the public. In some colonies all,* in all colonies many,—perhaps most—of the Acts Assembly, existed in manuscript only, if at all; their places of custody were not certainly known; they were registered perhaps, but never indexed. Those things were especially recorded as to the legislative acts of Jamaica, the leading colony of that time amongst all the West Indian settlements. It may well be, therefore, that those unprinted collections—for I have no means of access to them—may contain some specimens of the private legislation of the old plantation times; and, if so, that the censures quoted from the learned reports of the Royal Commission may be found peculiarly applicable to those acts, and especially to such as are Jamaican.† I presume them to be still remaining in manuscript. For it is not likely that, in the face of the strong and frequent condemnation of the general spirit of the West Indian Acts, printed and unprinted, as well as of their forms and modes of expression, which those Reports contained, the local authorities should have since then put themselves to the trouble and expense of com-

"officers in the West Indies generally,—proceeded to submit, the following "—among other Results and General Conclusions—as to the actual state of "civil and criminal justice throughout the whole archipelago;—viz., that "they had gradually served to render the necessity for an extensive change "in the judicial systems of those colonies sufficiently apparent,"—and "that as "far as related to the laws, there was, throughout the islands, a total want of "any fixed principles of colonial jurisprudence." *Id.* p. 97.

* *Id*, pp. 81, *et seq.*

† Both the two series (1825 and 1829) of reports abound with complaints of West Indian legislation, in all the respects above noticed, and they deplore the incompetence of the then judicatures, composed of mere laymen for the most part, to administer justice according to law. See amongst others, First Report, pp. 6, 9, 29, 123,—124; Second Report, pp. 6, 11, 58, 62; Third Report, pp. 6—11, 31—33, 58—64, 97—99, 110—114; and the references in my two last preceding notes.

pleting their printed collections. It is therefore by no means impossible, that some of the "private acts," to which I have adverted, may be found to militate against that universal rule of the same law, which denied to those derivative bodies the power to set particular persons or particular classes above the law by means of retrospective enactments, and thus to screen them, *ex post facto*, from the natural and ordinary consequences of their own acts. It may be that none of them deserve to be so considered. The point is unimportant. If there are none such, then there are no old West Indian precedents for any recent legislation of that character. If there are such precedents, they have no authority:—for they were *ultra vires* of the local legislature, and can have no legal validity, not having been ever confirmed or condoned by Act of Parliament.

It only remains for me to consider the rationale of that constitutional incapacity, which, according to all authority, is imposed upon colonial legislatures in regard to private legislation. It will be necessary for me to take the term in its largest sense, in order to make the suggested explanation quite intelligible. I shall therefore consider the question,—not merely with reference to "Private Acts," in the sense which I conceive the West Indian Commissioners to have intended to give them; but in the strict legal sense of those words as defined by two of the leading authorities; I mean Coke and Comyn.

In Holland's case,* the several kinds of Acts of Parliament are classified at great length, but also with much clearness. They are said to range themselves under the three following heads:—(1) General; (2) Special; and (3) Singular, Particular, or Individual,—that is to say, Private—Enactments. The

* 4 Co. Rep. f. 76. *a. b.* Too long for citation, the passages are so connected as not to admit of abridgment. But, although their purport is substantially as stated in the text, they are too important not to demand frequent consultation and perusal.

first are those which concern the whole realm or the whole church;—the second those which are expressly limited to one or more classes or places known to the law;—and the third are those which are expressly limited to some person or persons, natural, or incorporate, or the estates of such. The two first kinds of enactments have much in common. The third, however, has little in common with either. For instance, a special enactment merges into a general one; but a private enactment, however worded, preserves its own character. It will even impose that character upon so much of the containing statute as concerns itself; whilst, on the contrary, enactments which would otherwise belong to the second class, that of special acts, will exchange their character for that of the first class, and become general acts, if the language be susceptible of a general interpretation, as well as of a special one. We have here the foundation of the doctrine which, although more elaborately explained in some modern cases, has always been followed both at law and in equity:—That an act, or a part of an act, private of its nature, cannot be treated as a general enactment, even where the legislature has directed it to be received among the public acts,* and to be judicially noticed as such; and that a direction of that kind cannot prejudice strangers, nor even affect the public at large with notice of the provisions of the enactment;† for if every man is so far party to it as not to gainsay it, none can be said to be parties so as to give up their rights, except the actual parties thereto;‡ and not even those, unless the forms and conditions of the general law have been duly observed in the obtaining of the

* As to which see now the 13 and 14 Vict. c. 21. s. 7.

† Rex *v.* London, Skinn. 293-4; Hesse *v.* Stevens, 3 B. & P. 565; Brett *v.* Beales, 1 M. & M. 425; Dawson *v.* Paver, 5 Hare, 434; Ballard *v.* Way, 1 M. & W. 529; Taylor *v.* Parry, 1 M. & Gr. 604, Cowell *v.* Chambers, 21 Beav. 619.

‡ Lacy *v.* Levington, Ventr. 176; Provost of Eton *v.* Bishop of Winchester, 3 Wils. 483; Barrington's Case, 8 Co. Rep. f. 138 *a.* 2 Bl. Comm. 344-6.

act. For it is said to be, after all, nothing higher than a Parliamentary contract.*

But there is yet another classification of statutes; and that has received the approbation of Comyn. It is also one more familiar to the public at large; and therefore not unlikely to contain the definition which we ought to give to the term "private acts," as used in the Reports of the West Indian Commissions and their Appendices. According to that classification, all acts or parts of acts are private, which are not general; and some of the instances given to illustrate the definition are unquestionably instances of what ought properly, according to the other and perhaps better definition, to be set down in the class of special enactments. With reference to the question before us, the whole passage deserves our most careful and anxious consideration.†

"Private enactments are those which concern a particular "species, thing, or person, of which the judges will not take "notice without pleading them; namely, Acts relating to "the Bishops only; Acts for Toleration of Dissenters; Acts "relating to any particular place; or to divers particular "towns; or to one or divers particular counties; or to the "colleges only in the universities."

Viewed in the light of this latter definition, the power to pass "private Acts," with or without reservation of the Queen's allowance thereof, through a Secretary of State, is not one lightly to be entrusted to any provincial legislature; nor at all, but by an express Act of Parliament. In point of capacity, information, and broadness of views, it is very rare to find in any colonial assembly anything to boast of; and if so much as mediocrity be attained, it is well. But, even were they

* Per Lord Eldon C. in Blakemore *v.* Glamorganshire Canal Company, 1 M. & K. 162-3; Same *v.* Same, 1 C. M. & R. 141; Pritchard *v.* Heywood, 8 T. R. 472; Rex *v.* Camberworth, 3 B. & Ad. 108.

† Com. Dig. "Parliament." (R. 7.)

more fortunate in those respects, they are not the legislatures to whose good pleasure should be entrusted these authorities of excluding, by private enactment, from the pale of the constitution or the law, whole classes of the Queen's natural born subjects, or of admitting within the same such as may happen to be for any reason by law excluded from those common rights, or of exercising those powers of enfranchisement or disfranchisement upon places, as well as, or instead of, the persons inhabiting the same, or of suppressing existing corporations, or of recalling into vigour such as may, for any reason whatever, have forfeited their existence. If the questionable policy of *privilegium*, questionable alike whether we regard it on the side of the interests which it fosters, or of those which it takes away,* were one which should be sanctioned at all within any of our colonies,—its introduction surely ought not to be left to any meaner authority and responsibility than those of the Imperial Parliament. Therefore, in point of political expediency alone—independently of higher considerations—a power to derogate from general rights or general liability, whether in favour or in prejudice of any one particular person or class of persons by private or special enactment, cannot be presumed or presupposed to have been conferred upon any of those inferior legislatures. Neither can it be said to have passed to any of them as one of the incidents of their delegation, it not being necessary thereto. Legal principle is here entirely in accord with the political fitness of things.

It is vain for them to object examples of Imperial Legislation. There is no analogy whatsoever between Parliament and them. If Parliament has possessed—and unquestionably

* Vetant leges sacratæ; vetant duodecim tabulæ, leges privatis hominibus irrogari. Id enim est privilegium. . . . Hoc plebeiscitum? hæc lex? hæc rogatio est? hoc vos pati potestis? hoc ferre civitas? ut singuli cives singulis versiculis e civitate tollentur?—*Cicero, pro domo sua*, 17.

it has possessed from all time—that extraordinary power, it is simply because that power was originally the highest of judicial powers, and therefore vested in the High Court of Parliament.* Of none of the provincial legislatures can so much be affirmed. Not one of them claims by imprescriptible right; not one possesses an appellate jurisdiction; to not one can the name of Judicature, or the name of Court, be attributed. There is then no analogy whatever, in that respect, between their condition and that of Parliament. There was good constitutional reason why Parliament should be invested with the power of special and particular legislation; and why, in exceptional cases, exercise it. There is every reason in the world, why no merely derivative and subordinate legislature should exercise it, or have it, or pretend to it.*

* Voluntas universorum ad singulos directa, boni publici intuitu, *judicium* est. . . . Sic judiciorum non alia quam legum origo. . . . *Quidquid respublica se velle significavit id inter cives singulos jus est*;—differt hæc regula a priori; ["quidquid respublica velle significavit id *in cives universos* jus est"], quod judicium a lege civili; est enim judicium lex ad factum singulare aptata. "Hugonis Grotii de jure Prædæ Commentarius (Ex auctoris Codice descripsit, etc. H. G. Hamaker, Litt. Dr.;" Hagæ Comitum, 1868.) Cap, II., pp. 23, 24.

† "Their Lordships see no reason to think that, in the principle of the "common law, any other powers are given to them (the Newfoundland "legislature) than such as are necessary to the existence of such a body, "and the proper exercise of the functions which it is intended to execute. " . . . The argument from analogy (to the powers of Parliament) "would prove too much; since it would be equally available in favour of the "assumption, by the Council of the island, of the power of commitment, "exercised by the House of Lords; as well as in support of the right of im- "peachment by the assembly—a claim for which there is not any colour of "foundation. . . . This assembly is no Court of Record, nor has it any "judicial functions whatever. . . . They are a local legislature, with "every power reasonably necessary for the proper exercise of their "functions and duties. But they have not—what they have erroneously "supposed themselves to possess—the same extensive privileges which the "antient law of England has annexed to the Houses of Parliament." Kielley *v.* Carson, 4 Moo., Pr. C. C., 88, 89, 90, 92; overruling a *dictum* of Parke, B., in Beaumont *v.* Barrett, 1, Moo., Pr. C. C. 66. "It cannot be

But, whilst this is true of all exceptional powers of that kind, whether having respect to individual persons and things, or to classes of such, it is especially true of the latter. A "Private" Act proper never binds any, but the parties to it, or those who, according to the "Clauses' Acts," are to be deemed to be parties. It is a mere Parliamentary contract, and, in the great majority of cases, one to which the parties have readily and willingly subscribed, and rigidly excluding all. As to such Acts, cases where capacity or status may be affected, there seems no reason but the principle of the thing for denying to the local legislature the power to legislate.

But "Special" Acts are upon an entirely other footing. They bind the community. They require no consent of parties. They have, in short, nothing but their subject matter and their name, to distinguish them from "Public General" Acts: and the same rules of construction are applicable to the former which govern the latter. The various penal Acts against Nonconformists, for instance, which, as we have seen, certainly belong to Lord Coke's category of "Special" Acts have never, *in favorem vitæ et libertatis*, been interpreted to be distinguishable from "Public General" Acts; even where some of their provisions were certainly of the nature of "Private" or "Particular" enactments; and, upon principle, therefore, open to the same challenge with enactments of that kind when standing alone.* But the contrary was the

"granted them, that they are capable to enact at their own will and "pleasure what they think fit. For they cannot, by a law, alter the common "law of England, and the settled course of proceedings thereon. They "cannot change the common securities of the kingdom. They cannot enact "anything against Her Majesty's (Queen Anne's) prerogative. They cannot "take away, by any Act they can establish, any authority vested in the "Governors, by Her Majesty's commission, with many other things too "many to be here enumerated. And they cannot pretend to have an equal "power with the Parliament of England." Rawlin, A.G. (*Tempore Annæ Regin.*) Chalmers' "Opinions," p. 276 (ed. of 1858.)

* Earl of Leicester's Case. Plowd., 398.

opinion of the Court. Thus, the general provision of the thirteenth section of the "Act to prevent and avoid danger which may grow by Popish Recusants,"* in common with all the other general provisions on the same subject,—viz., the forfeiture of real estate by Roman Catholics for refusing to take the oath of Spiritual Supremacy, and go to Church,—were holden to be of general obligation: whilst so much of the same section as regulated the distribution of the spoil,† was holden to be only "particular" or "private;" notwithstanding the juxtaposition with those of a public general character, and that they were, therefore, challengeable *pro tanto* by those having interest;‡ that is to say, by all persons, not being the unhappy ex-proprietors themselves.

Instances of that kind have, in modern times, somewhat obscured the tradition—uninterrupted, nevertheless, and constant—by which the authority of Parliament to legislate, for special or particular cases only, is asserted and justified upon the ground, that it belongs to the equitable jurisdiction of Parliament, considered as the highest Court of judicature. That "Parliament" and "Court of Chancery" were convertible terms, even in the modern days of Lord Holt, and were so used by Lord Holt himself, is certain.§ That, in fact, the equitable jurisdiction of the Court of Chancery was derived solely from the High Court of Parliament, is also certain.‖ That

* 3 Jac. I., c. 5, s. 13, "Statutes of the Realm," Vol. IV., pp. 1077, 1081 (or s. 18 of the common editions).

† These portions of Section 13 are numbered separately, in the common editions, as ss. 19, 20, and 21.

‡ Chancellor, etc., of Oxford's Case, 10 Rep. 57, *b*; Rex *v.* London, Skinn., 294. See 1 Douglas, 97, *note*.

§ King and Queen *v.* Lady Portington, 12 Mod. 31. Compare Croft *v.* Evetts, Sir F. Moore, 784.

‖ Hic est qui leges regni cancellat iniquas,
Et mandata pii principis æqua facit.

Johannes Salisburiensis (tem. Henr. II.)

at least the jurisdiction was daily and actively exercised by the latter, from the earliest days of which we have any records of procedure, is clear. But the same precedents, which abundantly shew these facts, also shew that the form, in which the High Court made its will known on all such occasions, was not that of a judgment at law—albeit sufficiently understood—nor yet of a decree in Chancery, for that was not yet come;—but the same familiar form which was then used in all Parliamentary proceedings—the Petition of the Two Houses; the "Response" of the King; and the Entry upon the Roll of the result;—in other words, the form of a "Statute." Deceived by the increase, in latter times, of the Entries upon the "Statute Roll," writers of the last century, and amongst them Mr. Reeve, have erroneously supposed that the form was first in those late times adopted; that the earliest "Private Acts" which occurred were Attainder Acts; and that the reign of Richard III. furnished those first models of a new form of legislation; which, they agree, was only a new form of adjudication, by Parliament, upon cases not falling under general and ordinary law.* But the "Statute Book" itself, and also the Rolls of Parliament, which contain hundreds of similar Acts not found upon the Statute Roll, shew the error and anachronism of their hypothesis. The first Attainder Acts in the Statute Book† are older, by two centuries or more, than the reign of Richard the Third; and the constant and unbroken series, which the same collection presents, of Acts of that kind, as well as of Acts to repeal Attainder Acts, very abundantly shews, that, from the time of Edward the Second, at least, to the time when Richard the Third ascended the throne, it had remained

* Reeve's History of English Law, Vol. III., p. 379; Vol. IV., pp. 129-30.

† Amongst these the "Exilium Hugonis De Spenser Patris et Filii," must certainly be ranked. It was passed in the 15 Edw. II., and is included amongst the statutes of that year. "Statutes of the Realm," Vol. I., p. 181.

the well established practice.* The Rolls of Parliament, which contain many more examples, also shew that, whilst the particular case of attainder by statute was at least as antient as the reign of the Second Edward, the general practice of derogating from common right or common liability, whether by way of special legislation or by way of private legislation, properly so called, in all cases and chiefly in civil cases, was much more antient; that it was perfectly understood and in full vigour from the very beginning of Parliaments; and therefore that, far from its having been, as Reeve supposed, derived from,—it must have furnished precedents for—the particular practice in Attainder.

* The restitution of "the adherents to the quarrel of Thomas, Earl of Lan-"caster," was not made the subject of inferior judicial investigation, but was accomplished by Parliamentary enactment. That of the deceased Earl himself and his heirs was by a judicial proceeding in Error, the Record of which is extant (Claus.) 1, Edw. III., m. 21, dorso. II. Rot., Parl (No. 1,) f. 4 a, 5 a. The enactment for restoring his "adherents in terms provided . . . "qe les Utlagaries et Bannissementz faitz per Cause de la Querele soient "reversez et anentz, et ceo que est arere des Ranceons anentez . . . Quant "as Fins, etc., soient dampnez . . . Quant as Fins et Ventes de Terre et "Dounes faitz per Force et Durite, etc.: soient defaites. Et qe de ce soit fait "Article de Statut." Claus. 1, Edw. III., P. 1. membr, 23, *dorso*. II. Rot. Parl. (1, Edw. III. No. 2.) f. 5, b. It seems however to have been found that an entire restitution had become impossible, and that it was necessary to have regard to newly acquired interests. So at least I explain the way in which the two "Articles," for carrying into effect the purposes of the legislature, were drawn up by the judges, according to the manner of that time. They are the second and third "Articles" (or "Chapters" as the phrase now is) of "the Statute" of the Session;—1 Edw. III. Stat. I. ("Statutes of the Realm;" Vol. I., pp. 252, 253.) The "Liberate" Writs, for giving effect to those restitutions, are also extant:—Claus. 1, Edw. III. P. 1, membr. 2, 19, 21, 22. The model Writ, "pro Simone de Bereford," records the reasons which had so moved the legislature. . . "pro eo quod Querela dicta, in "dicto Parliamento Nostro, per Nos et totum Parliamentum Nostrum, bona "et justa adjudicata est, et judicia versus illos qui de dicta Querela fuerunt "reddita penitus adnullata." II. Rot., Parl. Append. (Nos. 1-7.) ff. 420 *a.b*, to 421 *a*.

Thus, not to take up your time with reference to the printed Rolls of Parliament, where nearly every "membrane" supplies some cases in point,—or the Parliamentary Writs of a period before their commencement, where Sir Francis Palgrave has collected and noted similar instances,—and confining myself even to the printed collection of the Statutes of the Realm—I find in the Great Charter of King John* no less than three special and twelve private enactments;—and in the two Great Charters of the first and second years of Henry the Third† two special and two private enactments;—whilst that of the ninth year of the same reign re-enacts the two former;‡ omitting only the two latter. Of later enactments of either of those two kinds, I may here specify the "ordinance," *pro quibusdam hominibus de Comitatu Kanciæ*,§ the *Assisæ Panis et Cerevisiæ*,‖ the *Dictum de Kenilworth*,¶ the *Estatutz del Jewerie*,** the *Statuta Civitatis Londoniæ*,†† the *Statutum de Terris Templariorum*,—(a remarkable illustration of my remarks upon the equitable jurisdiction of

* "Charters of Liberties" (Edition of the Record Commission, prefixed to Vol. I. of "Statutes of the Realm") pp. 10—13.

† *Ibid.*, pp. 15, 18, 19.

‡ *Ibid.*, pp., 23, 24. In the common editions of the Statutes, the Great Charter of the ninth year of Henry the Third is always inserted as the first of the Statutes. In the common edition of the Statutes the two enactments referred to are numbered as chapters 9 and 33 of the Great Charter of the 9 Henr. III.

§ 16 and 17 Henr. III., "Statutes of the Realm," Vol. I., p. 225, note (*a*).

‖ 51 Henr. III., in common editions; *Incerti Temporis*, in "Statutes of the Realm," Vol. I., p. 199.

¶ 51 and 52 Henr. III. *Id.*, Vol. I., p. 12.

** [4 (or 18) Edw I., in common editions;] *Incerti Temporis*, in *Id.*, p. 221. And see an unprinted Act of the 54 and 55 Henr. III. on the same subject, in Fœd. N. E., Vol. I., P. I., p. 489.

†† 13 Edw. I., "Statutes of the Realm," Vol. I., p. 102.

Parliament to give relief against the harshness of strict laws,)* the *Statutum de Gaveleto in Londonia*† and the like.

Neither must it be forgotten that, although the practice has long ago been abolished in consequence of abuses which in time crept in, the framing of all Acts of Parliament originally belonged to the judges. When that ceased to be the practice as to Public General Acts, yet, as to Private Acts, it always continued to be both the theory and the practice,—that the bills for them were draughted and settled by the judges. That practice lasted down to a period within the personal recollection of some here present. We ourselves have seen the judges relieved of the duty of perusing and considering the recitals of Estate Bills, and a Chairman of Committees substituted in their place. The change has not passed unremarked, or without consequence. Before the change, the recitals in every such bill were considered to be admissible in evidence of the truth of the matters recited;—and, for some purposes, *e.g.*, the proof of pedigree or relationship, they were considered to be very good evidence. They are so considered no longer.‡ It is very evident that the intrinsic value of such legislation, and its extrinsic credit, must be greater or less, according to the preponderance or deficiency of the juridical principle amongst its elements. This is a consideration not to be lost sight of, with reference to the pretended analogy between a Provincial Council and the High Court of Parliament.

Upon the whole, those principles have been duly observed in practice. There are, as I have shown, occasional instances of nonobservance, which were speedily suppressed. In one or two of them, the pretention to deprive of protection particular classes or persons had made requisite the interference of authority to repress it. But the interference was

* 17 Edw. II., *Id.*, p. 194.

† 18 Edw. II., in common editions; *Incerti Temporis* in "Statutes of the Realm;" Vol. I., p. 222.

‡ Shrewsbury Peerage Case: 7, H. L. Ca., 13: *Per* Lord St. Leonards.

effectual; and those endeavours, at least, do not seem to have been repeated. The wildest dream of colonial independency never went so far as to imagine, in a colonial legislature, any such jurisdiction as that which the High Court of Parliament exercises; when, for example, it passes into law, its Acts of Pains and Penalties, or Acts of Attainder. It would be strange indeed if any of them possessed it; since not one of them, whether representative or not, as we learn from the highest authority,* had so much as "a colour of foundation for "claiming that much humbler right—the right of impeach-"ment:" a right, nevertheless, which, unlike that of adjudication in such cases, is so far from being a reserved duty of Parliament, that it belongs at common law to every grand jury,—and that the proof of its having been actually exercised by such bodies are amongst our earliest and best established precedents.† And, as we learn from the great American jurist,‡ it was not until after they had emerged from colonial dependency, into a state of asserted sovereign independence, that the Thirteen Colonies of North America began to exercise, with other Imperial powers, those of attainting men for treason, and confiscating their estates, by legislative enactments. We know also, and on the same high authority, that even then, and notwithstanding the alleged necessity of that mode of reprisals in kind upon their enemy,—the Imperial Parliament,—still the public feeling of the insurgent communities was against the assumption; as dangerous in point of precedent, and mischievous to the actual peace and prosperity of their inhabitants;—that it lasted only during the war, and died with the occasion which gave rise to it;—and that it was

* Kielly *v* Carson, 4 Moo. P. C. C. 88, 89.

† Amongst others, Adam de Stratton's Case, P. 7 Edw. I, Memor. in Scacc. ff. 9, 10; Palgrave, "Rise and Progress," &c., vol. 1, 309.

‡ Story's Commentaries on the Constitution, ss. 1337-1339, vol. III., pp. 210, 212.

with especial remembrance of the ill success of that new policy, that one of the first measures of Congress, after the peace of 1783, was to adopt into the constitution of the United States a declaration of the incapacity of the supreme legislature to renew or continue the experiment.* I cannot help the train of thought which here compels one to contrast that remarkable passage, from the history of so many of the English colonies—and those by far the most important and powerful—with the endeavour now being made by Jamaica officials to obtain for an enactment, lately passed by themselves, and for their own indemnity against all civil suit and criminal prosecution, the force of an exception to the general law.*

Far from following the ordinary course of legislation,—whether general, special, or private,—that particular kind, which we know under the name of "Bill of Indemnity," seems to run in an opposing current. No other form of *privilegium* is so liable to abuse as this, in many cases, must be from its very nature. Moreover, there is something untoward in the law,—which should help the claimant to his remedy,—herself interposing between him and that remedy, and forbidding him to have recourse to justice; and that untowardness is so much the more enhanced, where the obstruction thus offered has reference to a pursuit for alleged crime. Lastly, it will necessarily be open to still further animadversion if, as is nearly always the case, it be made to operate retrospectively, or *ex post facto*;—a dangerous method at any time, but which, in the times of public alarm, of popular excitement, of local heats, or of party animosity, has not un-

* One of the Articles of the Constitution of the United States contains the following:—"No Bill of Attainder or *ex post facto* law shall be passed." For the history of that clause, see Story's Commentaries on the Constitution, s. 1337, vol. III. p. 209.

† Jamaica Assembly Act, 29 Vict., c. 1. See the Act, with the forms of Assent, etc., in "Papers relating to the Disturbances in Jamaica:"—Presented, etc., by Command, 1866, part I. p. 176, part II. p. 43.

frequently deserved the animadversion of the great American jurist,* by allowing itself to be drawn into an assumption, not merely of sovereignty, but of despotism.

There is one ground indeed, and only one, upon which it is possible to recognise the assumption, even on the part of Parliament, with constitutional principle. But that is not a ground open to any subordinate legislature, or indeed to any authority but Parliament. For it is the equitable and transcendent jurisdiction of that High Court over all matters, civil and criminal, within the Crown's dominions. When it passes a Bill of Indemnity, for acts done or suffered before, the High Court exercises its own original jurisdiction, to which the modern jurisdiction of its antient adjunct the Court of Chancery in analogous cases can be traced. It is, so to speak, the Injunction or Interdict, to stay prosecution or suit, where to permit either would be perilous to order or contrary to natural right. But, if no such reasons exist, there is no pretention to any Indemnity; and therefore to pass an Act of Indemnity, in such a case, would be simply the doing of a wrong to the subject and also to the community. If this be not the solution, it is impossible to recognise the legitimacy of this kind of exceptional legislation, under any circumstances; no, not even in the case of Imperial Parliament. It is deserving of remark, also, that, until comparatively modern times, the constitutional jealousy, which was excited by its first essays, and of which the same Statute Roll contains the record, was never altogether extinguished. Men could never forget that, unlike the other kinds of exceptional legislation,

* "The terms, '*ex post facto* laws,' in a comprehensive sense, embrace all "retrospective laws, or laws governing or controlling past transactions, "whether they are of a civil or a criminal nature. In all such cases, the "legislature exercises the highest power of sovereignty, and what may be "properly deemed an undoubtedly despotic discretion." Story, *ubi supra*, ss. 1337-1339, vol. III, pp. 209-212;—citing 2. Wooddeson's Lectures, pp. 621-4, 4 Inst. ff. 36, 37.

this kind was not one to which they could not assign an origin —that the period of that origin was notoriously one of tumult and civil war, and the occasion a mutual craving for the means of agression or reprisal by the one faction upon the other;—and that, almost side by side with the first example of the practice, the Rolls of Parliament also presented the record of the speedy, unqualified, and entire condemnation passed by the repentant Parliament upon its own work—expressly because it was found to be contrary to reason, justice, and the chartered right of every Englishman to seek, in the proper Court, his proper remedy for redress of wrong. And,—if it be indeed true that Indemnity Acts are certain privileges which are grantable at the mere pleasure of Parliament, and demand no such preceding deliberation and adjudication as in the cases of "Injunction" or "Interdict" in ordinary courts are certainly essential,—it is impossible to deny that the practice at large is equally open, with the particular instance in question, to the condemnation recorded in the Fifteenth year of Edward the Second. In neither case, however, should any pretention to that authority be urged by any meaner legislature.*

* The earliest example of an Indemnity Act, is perhaps the Statute or Ordinance of the 7 Edw. II., "ne quis occasionetur pro REDITU Petri de Gavestone." ("Statutes of the Realm," Vol. I., p. 170). It was not only repealed within the year, but there was substituted for it the Statute or Ordinance of the same year "ne quis occasionetur pro MORTE Petri de Gavestone;" which was, however, not so much an Indemnity Act, as an Act for removing doubts, as to the jurisdiction which had tried and condemned that favourite. Of the next precedent, and it occurred only eight years later, we can speak with less uncertainty; none of the records having been destroyed. In the 15 Edw. II, there was granted, by Statute, a general and particular indemnity, upon the occasion of the passing of the Attainder Act already noted of the two Le Despensers. It was granted to all, "of whatsoever estate or condition," being actors in or privies to "the pursuing and destroying" of the two lords, and the Indemnity (applicable not only to the King's suit, but also to that of any private person,) was expressed to be against all "treasons," "felonies," or "trespasses" soever, done in the premises. The title of the Statute is "Ne quis occasionetur pro Feloniis seu Transgres-

This appears to have been the view taken of the matter by the Law Officer of the Crown, whenever called upon to report for or against the allowance, or it might be the disallowance, of any colonial Act. If it sounded in Indemnity, or Bar of Suit or Prosecution, they held it "to fall under the rules of my Lord "Coke, of being impossible and inconvenient,"—and therefore void;—"inconvenient;" because, to be debarred of remedy, was "the highest injustice and the greatest of hardships;"—"and impossible;" because "those things they took to be legally "impossible, and what no Act of the island could lawfully "establish." For, whilst even a pardon was beyond their powers, that being a matter that must rest entirely in his Majesty's royal breast, weighing all the circumstances and

"sionibus factis ... prosecutione H. le De Spenser, patris et filii"; 15 Edw II. ("Statutes of the Realm," Vol. I., pp. 185-6, and note (2) to p. 185). Later in the same year, the King summoned a new Parliament at York, which passed an Act (*Id.*, p. 187, and *Ibid.*, n. *b.*), for repealing the Attainder Act above mentioned, and then took into consideration the Indemnity Act also, upon the complaints of the Despensers and their adherents, (*Id.* pp. 188-9) that, albeit "they ought to have their recovery "against them who did the said felonies and trespasses, namely, according to "the laws and usages of the Realm, to sue against all who upon them had "trespassed, as is aforesaid, such suit they will not be able duly to make, if "the said statute, purveyance, and acquittance of those felonies and tres-"passes, were not repealed and anulled." The repeal was granted:—and the grounds expressed in the repealing Act itself were, that the Indemnity Act was, upon examination, "found to be against reason and common right, "against the King's Oath made at his coronation, and against the tenor of the "Great Charter of the Franchises of England;—the which is affirmed by the "sentence of excommunication; and in the which it is contained that the "King shall not deny, neither delay to none right nor justice;" and, in fine, "in offence of others' right, and so in prejudice of him and of his crown, and of "his royal dignity." Both of those repealing Acts were themselves repealed, immediately after the first success of the revolution which raised his son to the throne; 1 Edw. III, Stat. I., cc. 2, 3, ("Statutes of the Realm," Vol. I., pp. 252-3), and II. Rot. Parl., ff. 5 *b.*, 420 *a. b.*, to 424 *a.*; and in their stead a new Act of Indemnity was passed; but for the very different purpose of protecting the new King, the Queen-Mother, and their adherents, in

consequences that might be foreseen or apprehended,—an Indemnity was of far other consequence than a Pardon;—and "they did not see upon what reason it could be founded, that "His Majesty's subjects, injured in their property, should be "delayed in the recovery of that satisfaction which the law "gave them."*

A not irrelevant example is to be found in the history of Hong-Kong;—which, although the youngest of all the British colonies, may perhaps claim the dubious distinction of having—during its brief existence—furnished nearly as many examples of vitious legislation and administration as the whole body of British colonies, whether of antient or of modern times;—the West Indies excepted. "An Ordinance for better securing the Peace of the Colony,"† passed by the local legislature on the

respect of all acts done by them, "from the day of the coming of the said "King and Queen into England, down to the day of the said King's Coro-"nation;" 1 Edw. III., Stat. I, c. 1, ("Statutes of the Realm," Vol. I., pp. 365-366). In the following reign, the Attainder Act was once more repealed; 21, Ric. II. Nos. 64-66. III Rot. Parl., 366 *b.*, 367 *a.b.*; but the Indemnity Acts were untouched; the bar, long since created by the effluxion of the statutory "time," making any repeal quite fruitless. Nor was the repeal of the Attainder effectual. In the next Parliament, not only the Act in question, but all the records and proceedings of the 21 Ric. II.—and indeed that Parliament itself—were by the 1. Hen. IV., c. 3. ("Statutes of the Realm," Vol. II., p. 112), "wholly reversed, revoked, "irrited, broken, repealed, and annulled for ever;" and soon after the revivor of the attainder of his house, the heir of Le Despenser was further adjudged to suffer the like forfeiture, in respect of his own complicity in the proceedings of the condemned Parliament;—1 Henr. IV. (Nos. 1 to 10), III. Rot. Parl., 449 *a. b.*, to 452 *a. b.*

* "Barbados," Rawlin, A.G., *temp. Annæ. R.* Chalmers, *ubi supra*, pp. 380, 381, "New Jersey," Ryder, A.G. (afterwards Lord Chief-Justice of King's Bench, and Murray, S.G., afterwards Lord Mansfield. C.J.); July 21, 1749. *Idem*, pp. 448, 449.

† "Ordinances by Sir John Bowring, Knight, LL.D., Governor and "Commander-in-Chief of the Island of Hong-Kong and its Dependencies, "etc., etc., etc., with the advice of the Legislative Council of Hong-Kong," No. 2 of 1857.

6th January, 1857—a time no doubt of great panic and excitement, resulting from the state of war, so to call it, then existing between the local authorities and the Mandarins of the neighbouring coasts,—contained, amongst other exceptional provisions, one (s. 11) for empowering "any person, lawfully "acting as a sentry or patrol," between 8 p.m. and sunrise, "to fire, with intent or effect to kill, upon *any Chinaman*, "whom he should meet with or discover *abroad*, and whom "he should have reasonable ground to suspect of being so "abroad for an *improper* purpose, and who, being *challenged* "by him, should neglect *or* refuse to make *proper* answer to "his challenge." Another section provided (s. 13) that "*no* "act done *or* attempted in pursuance of that ordinance should "be questioned in any court." All the provisions of the ordinance were, by another section, extended (s. 14) to all "persons serving in the sea or land forces of Her Majesty, "*or of her allies*;" and, in addition to the large powers thus conferred upon the British, French, and American forces—military and marine—at that time within the waters of Hong-Kong,—it was also provided, by the same section, that all such "persons" should be "deemed and taken to have such "*further* and *other* powers and authorities, for the better "securing the public peace and order, as they would have had "if martial law had been proclaimed within that colony;" yet so as not to confer (s. 15) upon a court-martial any jurisdiction over mere civilians. "Any Act done *or* attempted "in pursuance of such further or other powers or "authori-"ties" was cognisable by a court-martial only, and that too only "in the case of Her Majesty's said forces;" and, with that solitary qualification, it was expressly enacted,—as to "all "persons serving in the sea or land forces of Her Majesty *or* "of her allies," that (s. 14) "it should not be lawful to try "or punish any such persons" for any such act or attempt. Finally, the whole of the provisions of that ordinance were

made to apply (s. 10) to "all acts done or attempted before "the passing of that ordinance, and which would have "been lawful, if so done or attempted after the passing "thereof; and no man," it was added, "shall at any time "hereafter be called in question, for or in respect of the same."

The ordinance contained no suspensory clause, but only a clause empowering the Governor, if he pleased, to suspend it. Until then it was to have immediate effect; and it contained no reservation of the Queen's pleasure. It was, however, too manifestly at variance, in many respects, with all principles of jurisprudence and all notions of provincial subordination, to escape the condemnation of the proper advisers of the Crown. No sooner had their opinion been taken than, as we learn from Governor Sir John Bowring's "Proclamation" of the following 15th of July,* "the commands of the Secretary of State" to suspend its operation were despatched; and, on the same day, "An *amended* ordinance for better securing the peace of the "colony," was passed through all its stages by the legislative council, and received the Governor's assent.† Besides containing some important modifications, ordered by the Home Government of those other exceptional provisions to which I have referred only in general, the amended ordinance is noticeable, for the entire omission of all those which I have specified, except only the last; whereby, as we have seen, a retrospective operation had been given to the disallowed ordinance. That section was re-enacted, and is section 12 of the amended ordinance. In that shape, however, the ordinance received the approval of the Crown through the Secretary of State,‡

* "Proclamation" (No. 111, of the 15th July, 1857, in *The Hong Kong Government Gazette*, Saturday, 18th July, 1857, vol. III. (n.s.), No. 107, p. 1) by the Governor in Executive Council, for "suspending the operation of "Ordinance No. 2. of 1857."

† "Ordinances," etc., No. 9, of 1857.

‡ "Proclamation by the Governor," etc. (No. 168, of the 14th December, 1857, in *The Hong-Kong Government Gazette, ubi supra*, No. 129, p. 1).

not, as I believe, without some hesitation on his part, and almost on the eve of the retirement of the then Cabinet. It was probably thought that the retrospective effect of a temporary enactment, of that kind, was likely to be so inappreciably small, as to make it not worth while to send back the ordinance for a new amendment. Still the compliance is to be disapproved. It will be used hereafter, *valeat quantum*, as an example of what other petty legislatures conceive themselves justified in expecting at the hands of a Secretary of State; and, to that extent, it detracts from the usefulness of Secretary Mr. Labouchere's mercurial to the Governor and Legislative Council of Hong-Kong. It is true that the main purpose was fully answered, and especially so far as concerned the pretention to a power of passing Acts of Indemnity in favour of the wrongdoer or against his victim. Nevertheless, it should have been remembered that, not only in that form, but in any form, retrospective legislation is always dangerous, most frequently pernicious, and never unattended with serious consequences to particular rights vested and to particular liabilities incurred. Considerations such as these would have satisfied the minister, how impossible it was to acquiesce in the assumption of such a power, even for a transitory purpose, by any authority, less than Parliament itself, or not having an express delegation from Parliament. In fact, if not in form also, it is equivalent to an assumption to legislate for particular classes or particular persons, and against others; releasing the former from their civil and criminal responsibility, and burthening the latter with pains, penalties, and disabilities; and yet leaving the general law in force, and the general body of subjects in subjection to it;—a power with which, as we have seen, no such assembly has hitherto been invested but by Parliament,—nor yet by Parliament, except in the solitary and recent instance of the "dominion" of Canada;—and even there for some few specified cases only.

"It is in the general true," say the authorities,* "that no "statute is to have a retrospect beyond the time of its com "mencement. For the rule and law of Parliament is that "*nova constitutio futuris formam debet imponere, non præ-* "*teritis.*" No doubt the sovereign will of Parliament is always potent to make an exception to that general rule, in any particular case, by declaring its meaning to be that the Statute shall be retrospective. But the declaration must be clear and unequivocal. Otherwise the contrary presumption will obtain, and the general rule prevail in the construction of the Statute.† Surely the same jealous vigilance ought to be observed in the construction of powers conferred by statute or charter, of which the donees claim to be thereby empowered to make enactments in derogation to that rule. Nor here, again, are we without very high authority, in distinct conformity with principle and right reason.

We are told, by a very learned judge‡ that, "on the dis- "covery of some defalcations in the office of the Ecclesiastical "Registrar, at Calcutta, Mr. Bethune, the legislative member "of council proposed to enact a retrospective bill of pains and "penalties; by which the defaulting member should be sub- "jected to transportation for fourteen years. The Marquess "of Dalhousie recorded the following Minute on the subject: "'I am by no means confident that the power of the Council "'of India to pass a retrospective Act, inflicting punishment "'on an individual, for conduct which the statute law of "'England had not recognised to be a crime, and thus "'exercising an authority which the Imperial Parliament "'itself does not put forth except on the rarest occasions,

* Bacon's Abr. "Statute" (C.) and cases there collected.

† Hitchcock *v.* Way, 6 A. and E., 943. Moon *v.* Durden, 2 Exch. 22.

‡ "Cases Illustrative of Oriental Life, and the application of English "Law to India, decided in H.M.'s Supreme Court at Bombay;—by Sir Henry "Erskine Perry, late Chief-Justice;"—(London, 1853.) "Law of Things "and Contracts," p. 223 note (*a*).

"'and at distant intervals, would be received as indisputable,
"'either by legal authorities in England, or by the Honour-
"'able Court of Directors under whom we serve. The
"'Honourable Court has, of late, on more occasions than
"'one, evinced an inclination to hold that the legislative
"'powers of the council of India, on other points than those
"'which are specially regulated by the Charter Act,* are
"'anything but coextensive with the powers of other legis-
"'latures. . . . .' To this view of the Governor-
"'General, Mr. Bethune thus replies, 'I hold the legislative
"'power conferred by Parliament on the Governor-General
"'in Council to be as large within the sphere of its operations
"'as that of Parliament itself for the whole of Her Majesty's
"'dominions; subject only to these express exceptions made
"'by the Act by which this power was created. And I think
"'it right to assert this opinion as plainly and broadly as
"'possible, when the observations of the Governor-General
"'appear, in some degree, to countenance a different doc-
"'trine.'"

There can be no doubt that the legal adviser of the Indian legislative council had not the best of the controversy. He failed to see, I think, the question which was raised; namely,

* The Charter Act in question was the 3 and 4 Will. IV., c. 85:—and section 43 of that Act conferred the legislative power, and defined its extent by exactly the same limits as those of the common law. For they reserved: 1. The Charter Act itself; 2. All Acts of Parliament relating to the army in India; 3. Parliamentary supremacy, whether legislative or general; 4. Royal Prerogative; 5. [which seemed to be reserved already] The constitution or rights of the Indian Government; and, 6, "The UN-"WRITTEN LAWS or CONSTITUTION of the United Kingdom of Great Britain "and Ireland; whereon may depend, in any degree, the allegiance of any "person to the Crown of the United Kingdom, or the sovereignty or do-"minion of the Crown over any part of the said territories." I have set out the words themselves of this sixth reservation; it being very evidently the only one upon which Lord Dalhousie's just and well-founded doubt of his own power to legislate in derogation of the Queen's "protection,"—that correlative of the subject's "allegiance"—could have been founded.

whether the case before him were not one of "the express "exceptions made by the Act." There can be no hesitation in so considering that case. A more outrageous violation of all constitutional principle than the proposed bill would have effected I cannot imagine. But it was not suffered to pass.

These, however, are not merely my views. I am happy to say that higher praise than mine has been bestowed upon the language and conduct of the Viceroy of India in that case. The Minute of the Marquess has had the honour of being referred to from the Bench, as a true exponent of the constitutional doctrine on this head. "I agree with the Governor-"General,"—are the words of the learned Chief-Justice of the Supreme Court of Bombay in delivering the judgment of the full court in one of the celebrated Opium Cases of 1849,*— "in some views of his which have been lately laid before "Parliament;—that it would savour of much impropriety, and "be opposed to all constitutional doctrines, for a body like the "legislative council, with its limited powers and very peculiar "composition, to attempt to give a retrospective operation to "a statute of this kind."

The very occasion of those remarks afforded another illustration of the same doctrine. In the preceding year, the legislative council of India, re-enacting for India the English Wagers' Act,† had varied the language of that Act so as to make it of retrospective operation.‡ To an action,§ brought after the passing of the Indian Act, upon a wagering contract made before it, the defendant set up the statutory defence:—and he relied upon the variations introduced by the Indian legislature

* Ramlal *v.* Dulubdas; *per* Sir Erskine Perry, C.J., and Sir William Yardley, J., in "Cases Illustrative," etc., *ubi supra*, p. 223.

† 8 and 9 Vict., c. 109.

‡ Acts of the Governor-General and Council of India; No. xxi of 1848.

§ Ramlal *v.* Dulubdas, *ubi supra*, p. 221.

into the language of the corresponding act of Parliament, as shewing the intention to give a retrospective effect to the Indian Act;—also citing Freeman *v.* Moyes;* and Towler *v.* Chatterton.† The cases were certainly in point;—if the parity of the inferior with the imperial legislature was not wanting. But that parity failed altogether:—and the Court, therefore, on a subsequent day, unanimously "overruled the "new point,"—(as the Chief-Justice, in delivering the judgment of the court, styled the objection) ‡—"made in "the opium cases, that the act of the Indian legislature "had annulled all wagers in existence at the time of the "act's passing." It was true "that the Indian act departed "needlessly, and, as it turned out, mischievously, from "the language of the English statute." But it could not be, "without much impropriety and opposition to all constitu- "tional doctrines," interpreted to be the meaning of "a body "like the legislative council, to attempt to give a retrospective "operation to a statute of that kind." It was here that the Chief Justice took occasion to express, in the passage already cited by me in its proper place, the entire concurrence of the Supreme Court of Bombay in "the views" of the Governor-General on that subject, "which had been lately laid before "Parliament." On appeal to the Privy Council, this judgment was affirmed; without any expression of dissent on the part of the judicial committee from the *ratio decidendi* of the Supreme Court.§

It is difficult to overrate the value of those Indian precedents. The Legislative Council of India possessed a delegation from Parliament itself. The limits, imposed by Parliament, were in no respect more strict than any which fettered the exercise of the legislative authority of the freest of

* 1, A. and E., 338. † 6 Bing. 258.

‡ Ramlal *v* Dulubdas, *ubi supra*, p. 222.

§ Same *v.* same (on Appeal), 5 Moo. Ind. App. Ca., pp. 126-7.

colonial assemblies past or present. In some respects, the Indian legislature enjoyed a greater freedom than many colonial legislatures from imperial control. Amongst other immunities which it possessed, the exemption from all obligation to reserve the pleasure of the Crown, and the exemption from all liability to disallowance in England, deserve especially to be mentioned. Yet the constitutional incapacity of that legislature to make a law—even a public general law—which should operate *ex post facto*, was, on the first occasion, frankly suggested by the Viceroy himself, the principal estate in that legislature,—and solemnly declared, on the second occasion, by the supreme judicature, the "Charter Court" of the Queen. I need not speculate upon the view, which either authority would have taken, of the competence of the same legislature to pass an *ex post facto* Act, for indemnifying a person or a class, against the natural and legal consequences of acts done, or attempted, in violation of the general law in force within that community;—for, *è multo fortiori*, that view must have been the same.

The conclusion to which I have come is not at all affected by the extraordinary proceeding of Governor Eyre and the *ci devant* Jamaica Assembly, in sending up a bill for their own indemnity, nor the "Allowance," which Her Majesty was pleased to signify, of that measure. If the bill was *ultra vires*, the Royal "Allowance" could not make it law.* It would be a novelty, but not a dangerous novelty; an usurpation, but not a dangerous usurpation; for a nullity, like that, can never be drawn into a precedent.

My conclusion, therefore, is against the competence of that of any other derivative or subordinate legislature, not being specially and expressly thereunto authorised by Imperial

* Symons *v.* Morgan, Parl. Pa. (*ubi supra*), pp. 76, 81. Campbell *v.* Hall, Cowp. 204—209. *S.C.* 20 How. St. Tr. 327—329. "Canadian Freeholder," by Mr. Baron Maseres, p. 297.

statute, to bind the subject by any enactment derogating from common liability or common right;—and I think that an Act of Indemnity cannot form any exception to that universal rule.

NOTE.—The judgment of the Court of Queen's Bench (on cross-demurrers to pleadings) in the still pending case of Phillips *v.* Eyre, was delivered on the 29th inst., after the above paper had gone to press. In that paper I had carefully forborne all allusion to the single question which those demurrers raised, and which, when I was preparing it, was awaiting the judgment now delivered. That question was whether the Jamaica Act of Indemnity, referred to elsewhere, would be pleadable in bar of an action in Westminster Hall, if pleadable in bar to an action in Jamaica. The question of its validity in Jamaica was not raised upon the pleadings. For that, being in this country a question of foreign law, was a question of fact. There was no traverse of the averment in the declaration that "the Act "had become part of the law of Jamaica;"—and, for the purposes of the demurrer, that averment had to be taken as true. The Court held that, given the validity of the Act in Jamaica, as thus admitted by the plaintiff's demurrer, the Act ought to be taken as an equally good ground of defence in this country. I do not consider that the positions which I have defended are touched by that case.—T. C. A., 30*th January*, 1869.

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